FILE COPY

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANSTEEL METALLURGICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 436

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANSTEEL METALLURGICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

During the course of the oral argument herein on January 13, 1939, the Honorable Chief Justice inquired of counsel for the Board whether it was the Board's position that there was no conduct, no matter how illegal, which would justify discharge of an employee following an unfair labor practice by the employer.

The word "employee" is given a special meaning by Section 2 (3) of the Act, which is in nowise coextensive with the common-law definition.[1] Conse-

[1] See *Remington Rand, Inc.*, v. *National Labor Relations Board*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304

quently, the power of the Board to order reinstatement pursuant to Section 10 (c) depends not upon whether the employer has terminated the normal incidents of the employer-employee relationship but upon whether the persons reinstated are within the category termed "employees" for the purposes of the Act.

That this must be so is evident from the fact of what constitutes in law cause for discharge Discharge may be for any cause, however trivial, for example, violation of local regulations governing picketing—indeed for no cause at all—as well as for serious offenses The very nature of the power to discharge makes it a completely inappropriate criterion for the exercise of the Board's remedial power under the Act, and there is no warrant for the assumption that Congress intended that these remedial powers should be destroyed and frustrated on any such basis.

The criterion which is proper for reinstatement, therefore, is not discharge or illegal conduct, but whether reinstatement would effectuate the policies

---

U. S. 576; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *Carlisle Lumber Co.* v. *National Labor Relations Board*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th).

of the Act. Whether a discharge for illegal acts committed in the course of a strike induced by unfair labor practices should prevent reinstatement is a matter to be determined by applying that policy with the further limitation that under the Constitution it may not be arbitrary, unreasonable, or capricious. There are undoubtedly many situations in which reinstatement under such circumstances would not be proper Here, however, it was.

The Honorable Mr. Justice Stone inquired of counsel for the Board whether after complying with the Board's order by reinstating the employees the employer may then discharge them for illegal conduct occurring during the course of the strike.

Where reinstatement has been had pursuant to the power of the Board and the exercise thereof in a sound discretion to effectuate the policies of the Act by restoring the situation as it would have existed but for the employer's unfair labor practices, to the end that the employees may then with that full liberty granted them by the Act, the denial of which caused the strike, exercise the rights of self-organization and collective bargaining, the employer cannot, solely because of illegal conduct arising from and in connection with the strike brought about by the employer's unfair labor practices, discharge the employees after such reinstatement. Reinstatement contemplates restoration and continuity of relationship between the employer and employees which normally would have occurred un-

der the Act had the unfair labor practices not been engaged in.[2] Furthermore, under the facts of this case governing those previously reinstated in contrast with all those found by the Board entitled to be reinstated, the Board could not assume that reinstatement would be futile.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

JANUARY 1939.

---

[2] If the discharge is predicated upon a cause arising during the strike but still existent and operative after the strike, the employer could discharge. Thus, in one case recently decided by the Board, *Matter of Planters Manufacturing Company, Inc. and United Veneer Box and Barrel Workers Union, C. I. O.*, 10 N. L. R. B., No. 61, where certain employees were found to have been discharged for union activity at a time when they suffered a disease which apparently had not prevented them from working, the Board, in ordering reinstatement, nevertheless, provided:

"It appears from the record that some of the above persons to whom we have directed that an offer of reinstatement be made, may now be suffering from an illness rendering them unfit for work. Nothing in our Order shall be interpreted as preventing the respondent from taking steps appropriate to the situation, provided only, that in so doing no unfair labor practices be committed."

U. S. GOVERNMENT PRINTING OFFICE, 1939